

Insurance Premiums for Retirees After the Union Contract Expires

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I. THE PROBLEM

A plant closes unexpectedly. Workers are laid off, perhaps permanently. Their misfortune catches the attention of network news. Less is heard of those employees who have already retired before the plant closes.

The benefits for retired employees are often negotiated by employers and unions. But negotiators seldom make conscious provision for the effect of a total plant closure on retirees. Retirees' pension benefits are now extensively regulated by ERISA.¹ Other benefits are not so regulated. This Article discusses the employer's liability to continue paying insurance premiums for retirees when the plant has closed and the contract creating those insurance benefits has expired.

II. THE KURZ-KASCH CASE

Kurz-Kasch operates several plants in Ohio and Indiana. Before 1975 it operated a plant on South Broadway in Dayton.² Its contract with Local 11 of the Metal Polishers Union expired on September 15, 1975. The termination clause of that contract said that a notice to terminate or amend the agreement would result in termination of the entire agreement.³

Just before the 1975 negotiations, the company's personnel director wrote the union that "[y]ou are hereby notified that as of September 15, 1975, any agreement—written, oral or implied—or any conditions of employment or other understanding now in effect between Kurz-Kasch, Inc. and the Metal Polishers . . . will terminate."⁴

Kurz-Kasch and Local 11 did not reach an agreement in the fall of 1975. The union struck the plant, and on November 17, 1975, Kurz-Kasch decided to close the South Broadway plant. It has not reopened.⁵

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1. Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (1976 & Supp.).

2. Metal Polishers Local No. 11 v. Kurz-Kasch, Inc., 538 F. Supp. 368, 369 (S.D. Ohio 1982). The authors served as counsel for the company in this case, and the views expressed herein should be read with that understanding. This Article deals solely with the rights of voluntary retirees to insurance premiums and is not concerned with the developing body of case law on implied obligations not to discharge.

3. *Id.* at 371.

4. Kurz-Kasch, Inc. v. Metal Polishers Local No. 11, 79-1 Lab. Arb. Awards 3455, 3459-60 (1978) (Chapman, Arb.), *complaint dismissed*, No. 79-3379 (S.D. Ohio April 5, 1977), *dismissal vacated, appeal remanded*, 642 F.2d 452 (6th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981).

5. Metal Polishers Local No. 11 v. Kurz-Kasch, Inc., 538 F. Supp. 368, 369 (S.D. Ohio 1982).

Since the plant had been in operation for a number of years, retired employees represented by the union received retirement benefits under a negotiated pension plan. For these retirees the company also paid premiums on group life and health insurance. The expired agreement stated that "[t]he company agrees to pay . . . group insurance premiums required for the continuation of existing employee group insurance"⁶ for retirees meeting certain conditions. On December 16, 1975, the company wrote retired employees that, as of January 1 and February 1, 1976, respectively, the premiums for life and health insurance would no longer be carried by the company. All Kurz-Kasch employees associated with the South Broadway plant were affected: the company paid no further group life and health premiums for anyone.

Metal Polishers Local 11 brought suit on June 9, 1976,⁷ in the District Court for the Southern District of Ohio. The complaint claimed that the company's termination of the group policies of retirees (but only retirees) deprived them of a vested right. Since the expired contract committed the parties to grieve and arbitrate "any dispute," the district court ordered the parties to submit the dispute over premiums for retirees to an impartial arbitrator.⁸

Following the court's order, Arbitrator Charles Chapman heard the claim on September 6, 1978. On December 28, 1978, Chapman issued his award.⁹ He found that Kurz-Kasch was not obligated to continue paying premiums for retirees. His analysis was pragmatic. Since both parties "cost out" the contract proposals they present to each other, generally for the period the contract will run, it is highly unlikely that the parties anticipated costs beyond the term of the agreement; benefits extending beyond the contract term "would have to be clearly spelled out in the contract or be reasonably inferred from the language of the contract."¹⁰ The Kurz-Kasch group insurance clause referred to group plans "presently in effect" and further provided that retired employees could continue their participation in existing group plans.¹¹ These clauses imposed on the company an obligation to pay premiums only during the duration of the contract; consequently, the company could terminate the insurance premium payments after the collective bargaining agreement expired. The arbitrator considered evidence that during prior negotiations the union had demanded that retirees receive the same benefits negotiated for active employees.

This would lead [me] to the conclusion that, in bargaining for the insurance programs, the retirees obtained no benefits greater than those that were accorded to the then present employees of the bargaining unit. Thus, when the insurance benefits for regular employees ended with the termination of the contract, those benefits also ended for retirees.¹²

6. *Id.* at 371.

7. *Id.* at 369.

8. *Id.* at 370.

9. *Kurz-Kasch, Inc. v. Metal Polishers*, 79-1 Lab. Arb. Awards 3455, 3456 (1978) (Chapman, Arb.).

10. *Id.* at 3462.

11. *Id.* at 3458.

12. *Id.* at 3456.

After Chapman's decision, the district court dismissed the union's complaint.¹³

The union's appeal to the Sixth Circuit¹⁴ produced a startling result. Ignoring those cases holding that the district court has the option—indeed, the obligation—to order arbitration when the contract permits,¹⁵ the court of appeals said that under the contract arbitration could be invoked only at the union's request and that, since the union had not requested arbitration, the district court's arbitration order was incorrect. The court abruptly ignored the generous federal endorsement of labor arbitration that began in 1960.¹⁶

Back to the district court the case went. Kurz-Kasch urged that court to give the arbitration award conclusive (or great) weight. Perhaps stung by the court of appeals' reversal, the district court took great pains to say that the "arbitrator's decision can only be considered a nullity."¹⁷ The court, however, then reached the same result.¹⁸

The court relied on the clearly expressed termination clause, and on the ambiguous group insurance clause, to conclude that under the contract insurance benefits for retirees "were dependent *both* on the existence of a general employee [group insurance] policy, and the duration of the Collective Bargaining Agreement."¹⁹ Going beyond the arbitrator's analysis, the court addressed the further question "whether the retired employees may have a vested right to the insurance benefits provided for by contract 'as implied by their total relationship to the company, separate and apart from the Collective Bargaining Agreement.'"²⁰ The court concluded that to imply such an obligation would subvert the intentions of the parties because their collective bargaining agreement made the benefits terminable.²¹

III. PROBLEMS OF CONSTRUCTION

Courts facing the survival or nonsurvival of retirees' group insurance upon plant closure are confronted with an immediate problem. Professor Summers put it well:

The difficulty here is that the parties had no intent one way or the other on the specific issue when they negotiated the last agreement, or any of those which preceded it. No one at any time even broached the question of what would happen

13. Metal Polishers Local No. 11 v. Kurz-Kasch, Inc., 538 F. Supp. 368, 370 (S.D. Ohio 1982).

14. Metal Polishers Local No. 11 v. Kurz-Kasch, Inc., 642 F.2d 452 (6th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981).

15. Shaffer v. Mitchell Transp., Inc., 635 F.2d 261, 264, 267 n.12 (3d Cir. 1980); International Detective Serv., Inc. v. International Bhd. of Teamsters Local 251, 614 F.2d 29, 30, 32 (1st Cir. 1980); IBEW Local 278 v. Jetero Corp., 88 L.R.R.M. 2182 (S.D. Tex. 1972), *aff'd*, 496 F.2d 661 (5th Cir. 1974).

16. See United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564 (1960).

17. Metal Polishers Local No. 11 v. Kurz-Kasch, Inc., 538 F. Supp. 368, 370 (S.D. Ohio 1982).

18. *Id.* at 374.

19. *Id.* at 373 (emphasis added).

20. *Id.* at 373 (quoting Upholsterers' Int'l Union v. American Pad & Textile Co., 372 F.2d 427 (6th Cir. 1967)).

21. Metal Polishers Local No. 11 v. Kurz-Kasch, Inc., 538 F. Supp. 368, 373 (S.D. Ohio 1982).

if the Company went out of business. There is no evidence that such a possibility even crossed either party's mind. On the contrary, all of the discussions and all of the provisions in the Agreement proceeded from the premise that the plant would continue in operation for an indefinite period.

It is not surprising, therefore, that the words of the Agreement provide no clear guide; if they seemed to, it would only be an illusion, an unintended result. The Company correctly confronts the words as ambiguous. It is true that the word "continue" carries with it the idea of a future obligation to retirees, but it contains no defined time dimension as to how long or under what circumstances that obligation continues. Certainly, it does not speak directly to whether that obligation continues after the business has been terminated.²²

Summers is right. Most collective bargaining agreements are negotiated by corporate personnel directors and union business agents who are skilled at solving the immediate problems, or at least those problems that will last two or three years. The negotiators do not contemplate (or prefer to ignore) what will happen if the whole deal goes sour.

*Upholsterers' International Union v. American Pad & Textile Co.*²³ is just that case. The Sixth Circuit held that the employer was obligated to continue to provide eligible retirees with life insurance coverage,²⁴ basing its conclusion on two separate, but related, paragraphs of the collective bargaining agreement. The first paragraph said that the factory group insurance plan would continue in full force and effect for the duration of the "current" contract.²⁵ The second, immediately following, said that any employee with fifteen or more years of continuous service who retired at age 65 "will continue" with 2,000 dollars of life insurance.²⁶ The company proposed that this second paragraph meant "continue for the life of the agreement"; the union took the position that "continue" meant "for the term of employee retirement." Since the first paragraph expressly limited employee benefits to the life of the agreement but the second did not, the court adopted the interpretation of "continue" urged by the union.²⁷

Surely plaintiff's proof was sketchy. No court should be required to reach a conclusion of this financial magnitude on such a slender basis.²⁸ The opinion shows no record evidence of facts that are basic to contract construction, such as the length of time these clauses had been in the agreement or the negotiating history surrounding each clause. Nor does the opinion show if the obligations created by each clause were negotiated together, as part of the

22. *Roxbury Carpet Co. v. Textile Workers*, 73-2 Lab. Arb. Awards 4935, 4937 (1973) (Summers, Arb.).

23. 372 F.2d 427 (6th Cir. 1967).

24. *Id.* at 428.

25. *Id.* at 428 n.3.

26. *Id.* at 427.

27. *Id.* at 428.

28. Indeed, in distinguishing *American Pad* the district court in *Kurz-Kasch* adverted to the absence of any "closely related" language that would expressly limit the term of the contract. *Metal Polishers Local No. 11 v. Kurz-Kasch, Inc.*, 538 F. Supp. 368, 373 (S.D. Ohio 1982). Although other evidence also indicated only a terminable obligation, it is ironic that the strained use of negative implication in *American Pad* could be used to distinguish the case and even to support an opposite result.

same economic package. Significantly, the opinion contains no evidence of the text of preceding agreements to bolster a conclusion that changed interpretations were intended.

This evidence is relevant.²⁹ In *United Steelworkers v. Midvale-Heppenstahl Co.*³⁰ the court found an ongoing obligation to pay insurance premiums after plant closure in this language from the 1975 contract: "Life insurance premium for pensioners shall be paid by the company during *the life of the pensioner*. Life insurance for pensioners retiring under this Agreement shall be \$2,500.00."³¹ More unambiguous language would be hard to imagine. Yet bearing Professor Summers' warning in mind, the language alone does not indicate that the parties considered the circumstance of plant closure—or anything beyond a three-year contract.

Much stronger evidence, not referred to in the court's opinion, supports its result. In 1975 the parties substituted "the life of the pensioner" for the phrase "the term of this agreement" after the company stopped paying premiums for retirees during a strike.³² The court could have relied on the traditional canon that, when language is changed, a changed interpretation is intended. Furthermore, following expiration of the contract, but before plant closure, the company gave the following response to a questionnaire:

Q: What happens to a pensioner's insurance coverage if the Midvale-Heppenstahl plant should close?

A: Life insurance premiums for pensioners shall be paid by the Company during the life of the pensioner; Blue Cross coverage for which a pensioner is eligible shall be paid for by the Company until the labor agreement is terminated. (The above also applies to dependents of pensioners.)³³

The company construed the clause against its own interest to require continued payment of retirees' life insurance premiums after plant closure.

Midvale-Heppenstahl could claim that the changed interpretation covered only strike periods—the immediate cause of the change. But its agreement to be bound beyond the term of the agreement is apparent from its acquiescence to the language change and from its acknowledgment of the obligation in the questionnaire. The district court's decision is weakened by its disregard of strong evidence to support its reading of the contract.

The bare contract rarely tells its judicial reader whether a benefit survives its expiration. Yet sometimes a court has only the bare contract on which to base its decision. The evidentiary void is filled by imaginative advocacy and, perhaps, the court's own predilections. Still, if plaintiff is required to prove affirmatively that plant closure was considered by the parties

29. *But see* Local 461, IUE v. Singer Co., 540 F. Supp. 442, 447 & n.3 (D.N.J. 1982) (cannot consider parol evidence if collective bargaining agreement is clear and unambiguous).

30. 94 Lab. Cas. 20,940 (W.D. Pa. 1981), *aff'd mem.*, 676 F.2d 689 (3d Cir. 1982).

31. *Id.* at 20,940 (emphasis added).

32. Brief in Support of Plaintiff's Motion for Summary Judgment at 2, *United Steelworkers v. Midvale-Heppenstahl Co.*, 94 Lab. Cas. 20,940 (W.D. Pa. 1981), *aff'd mem.*, 676 F.2d 689 (3d Cir. 1982).

33. *Id.* at 1-3.

and that benefits were negotiated in anticipation of this possibility, *American Pad* would be decided the other way.

One looks in vain to the cases for a discussion of the elements of plaintiff's prima facie case and allocation of the burden of proof. Given the rarity of evidence of contract negotiations, this silence is not surprising. These considerations are nonetheless important and could well determine the outcome of a suit. Many decisions speak casually (and categorically) of "vested benefits." Clearly, when a worker retires his benefits "vest"; he has performed all the services required to entitle him to any promised benefits. But a vesting analysis does not answer, unless by ipse dixit, what those benefits are—including how long (and under what circumstances) they continue. If courts clarified the parties' burden of proof,³⁴ uncertainty would be diminished and perhaps much litigation would cease.

Finally, courts should not blithely lump together all fringe benefits that may accrue after the contract expires. For example, vacation pay and severance pay are in some ways similar to group insurance but in some ways are not. Again, *American Pad*³⁵ illustrates courts' failure to distinguish between different types of fringe benefits. The Sixth Circuit asserted, without explanation, that its conclusion was supported by *Smith v. Kingsport Press, Inc.*,³⁶ a vacation-pay case. Yet in *Kingsport Press* the evidence showed a distinct one-for-one relationship between each year of work tendered and an entitlement to vacation (whether one week or more, depending on years of service) accruing the following year. The contract expired, and the employees struck after the year's work was performed, but before the arbitrary (and, in the court's view, inconsequential) vacation eligibility date arrived.³⁷ In these circumstances the court refused to allow the company the windfall of avoiding its vacation obligations.³⁸

34. One court has done just that:

In light of the inherent duration of the retirement status beyond any particular contract, the nature of retirement benefits as deferred compensation for service, and the federal policy in favor of the protection of legitimate employee expectations, it is reasonable to adopt a rule of construction which creates a presumption in favor of vested retirement benefits in the absence of clear evidence indicating a contrary intention.

UAW v. Cadillac Malleable Iron Co., 3 EBC 1369, 1375 (W.D. Mich. 1982).

Unfortunately, all of the underlying premises are open to serious question. First, employment, like retirement, typically extends beyond any particular contract. Under federal law, strikers are regarded as employees. 29 U.S.C. § 152(3) (1976). Yet employers commonly terminate insurance coverage for strikers—indeed, the union did not contend in *Cadillac Malleable Iron Co.* that the company acted improperly in doing so for its "active striking employees." 3 EBC 1369, 1392 (W.D. Mich. 1982).

Second, the notion of "deferred compensation" was belied in the case itself, because the insurance benefits negotiated between company and union were typically extended to workers already retired. *Id.* at 1371.

The court derived the "federal policy" from the declared purpose of ERISA "to protect . . . employee expectations" regarding their anticipated retirement benefits. *Id.* at 1375. The court omitted to note the distinction between pension plans and insurance plans in the operation of that Act. See *infra* note 65.

35. *Upholsterers' Int'l Union v. American Pad & Textile Co.*, 372 F.2d 427, 428 (6th Cir. 1967).

36. 366 F.2d 416 (6th Cir. 1966).

37. *Id.* at 419-20.

38. *Id.* But see *California Hosp. Ass'n v. Henning*, 4 EBC 1230 (C.D. Cal. 1983) (federal district court issued preliminary injunction protecting employers from state penalties for nonpayment of vacation pay; case includes ERISA and NLRA preemption claims).

Surface parallels do exist between insurance benefits for retirees and vacation pay. For both the vacations in *Kingsport Press* and the insurance for retired workers, the employees have put in their requisite service. In both, the employees' enjoyment of the benefit is deferred. Kingsport's obligation for vacation pay is vested and arises on the vacation eligibility date in the following year. American Pad's obligation for insurance for retirees is vested and arises—in installments—each month, after the employees retire.

But vacation pay and retirees' insurance benefits, despite apparent similarity, are critically different. Vacation pay is an annual event, clearly geared to continuous service. Theoretically, employees are entitled to a rest after their required period of work. When an employee quits or retires, he ceases accruing (or earning) vacation pay. On the other hand, retirement alone does not end insurance coverage, because the parties may agree that it will not.

Although vacations are paid once, and insurance premiums in installments, this distinction is not controlling. An employer can contract to pay a debt either way. But analyzing how an obligation is to be paid does not answer whether the parties have originally contracted for the debt.

IV. PREMIUMS FOR THE INSURANCE OF RETIREES: VESTED OR NOT?

A. *The Ohio Cases*

Two Ohio cases³⁹ are widely cited to support claims that retirement insurance premiums are vested rights that cannot be defeated. As with most frequently cited cases, the claims made for the holdings are far broader than the holdings themselves.

*Cantor v. Berkshire Life Insurance Co.*⁴⁰ concerned an insurance agent who was employed under a "career contract" that supplied retirement income according to a specified formula if the agent worked a given number of years. Either party could terminate the contract by giving thirty days written notice. Plaintiff agent served his time and retired; defendant insurance company tried to cancel his contract and thus to lower his retirement income. The parties agreed that plaintiff served his time with the company, developed business, and reached the mandatory retirement age.⁴¹

In the lower courts the insurance company was successful in asserting that a termination clause is a termination clause, and because the termination clause at issue had no limitation, the company could properly terminate the contract at will, as it did.⁴² The Ohio Supreme Court framed the issue in terms that foretold the result: "whether the rights of an employee in a noncontributory retirement system established by an employer may be divested by

39. *Sheehy v. Seilon, Inc.*, 10 Ohio St. 2d 242, 227 N.E.2d 229 (1967); *Cantor v. Berkshire Life Ins. Co.*, 171 Ohio St. 405, 171 N.E.2d 518 (1960).

40. 171 Ohio St. 405, 171 N.E.2d 518 (1960).

41. *Id.* at 406-07, 171 N.E.2d at 520.

42. *Id.* at 407, 171 N.E.2d at 520.

the employer after the employee has fulfilled all the conditions relating to his right to retirement benefits.”⁴³

Noting that pensions were once regarded as a gratuity from the employer that could be terminated at his whim, the court said that retirement benefits were increasingly treated as rights vested in the individual. The consideration flowing to the employer was the individual's observance of all terms of the employment agreement. Since service was the consideration, whether the employee contributed to the retirement program was immaterial.⁴⁴

Reasoning that a retirement program is a basic part of the employee's remuneration (much as wages), the court concluded that “after an employee has accepted employment under such circumstances, [the employer cannot] withdraw or terminate the program after an employee has complied with all the conditions entitling him to retirement rights thereunder.”⁴⁵ When the employee complied with all the terms of the employment agreement, he created a vested right that could not be defeated by the termination clause.⁴⁶

Seven years later the court in *Sheehy v. Seilon, Inc.*⁴⁷ held that insurance benefits of retirees could not be changed no matter what the cancellation clause in individual employment contracts said. Seiberling Rubber Company was acquired in early 1965 by Seilon. Seilon discovered the actuarial expense of carrying the medical benefits of retirees and decided to cancel retirees' insurance.⁴⁸ The *Sheehy* court restated *Cantor* in broad terms:

The *Cantor* case stands for the general proposition that, where an employee has complied with the conditions of his contract of employment, benefits have been promised and conferred on him by his employer as an inducement for the continuance of his service to the employer, and such employee reaches the specified retirement age, he acquires by the promise and agreement of his employer, a vested right to those benefits, and, in the absence of good and sufficient cause for forfeiture, he may not be deprived thereof, notwithstanding a proviso in the contract of employment to the contrary.⁴⁹

The Ohio courts thus have read as insignificant a termination clause: it cannot defeat fully vested rights. When individuals work for a stated period of time and in anticipation of an announced retirement program, retirement benefits, whether pensions or insurance premiums, may not be cancelled because they are too expensive. The courts, however, offer no guidance on a question arising from a typical set of facts: What is the legal result of an adjustment of benefits? If Seilon had not cancelled the insurance of retirees but had merely reduced insurance coverage, and in turn increased payments under the pension plan or offered additional and unrelated insurance credits, the value of

43. *Id.*

44. *Id.* at 408-09, 171 N.E.2d at 521.

45. *Id.* at 410, 171 N.E.2d at 522.

46. *Id.*

47. 10 Ohio St. 2d 242, 227 N.E.2d 229 (1967).

48. *Id.* at 242-43, 227 N.E.2d at 230.

49. *Id.* at 243, 227 N.E.2d at 230.

the overall benefits might remain the same, or indeed improve, but the benefits themselves would not be the same.

Companies occasionally adjust parts of the retirement package as they gain experience with it. If, for example, a company were to add dental coverage to its insurance program for active employees, but did not do so for retired employees, it would be hard to claim that the insurance benefits for retirees should be increased accordingly. The former employees would not have retired with the inducement of dental coverage because it was not available when they retired. Such a claim by retirees would be convincing only if retirees were promised benefit increases equal to those given active workers.

Underlying both *Cantor* and *Sheehy* is judicial concern for the unequal bargaining power of the retiree in dealing with his employer. This concern is not limited to Ohio courts, for federal courts are equally sympathetic to retirees, regardless of whether the retirees are represented in collective bargaining.

B. *The Federal Cases*

Unions negotiate wages and benefits for active employees, benefits for active employees' retirement, and benefits for retirees as well. The possible scope of that negotiation is illustrated in *Heheman v. E.W. Scripps Co.*⁵⁰ In that case the Cincinnati Post, in return for concessions by the typographical union, agreed that its printers would be "continuously employed for the remainder of their working lives by the Post."⁵¹ When the Post later terminated its printers, it argued that the lifetime employment agreement expired with the underlying collective bargaining agreement that established the terms of the employment.⁵²

The Sixth Circuit disagreed. It enforced the lifetime agreement's specific statement that it "supersede[d] any and all existing contracts and/or agreements between the parties and [was] permanent unless cancelled by mutual agreement of both parties."⁵³

Regarding benefits for retirees, *Allied Chemical Workers v. Pittsburgh Plate Glass Co.*⁵⁴ establishes that the benefits are a permissive subject of bargaining. In the argot of the specialty, this holding means unions and employers can request, urge, or cajole (but not insist on) talks on the subject.⁵⁵ *Pittsburgh Plate Glass*, in which the retirees' group insurance coverage had been negotiated in 1950, illustrates that collective bargaining has long con-

50. 661 F.2d 1115 (6th Cir. 1981), *reh'g denied*, 668 F.2d 878, *cert. denied*, 102 S. Ct. 2272 (1982).

51. *Id.* at 1118.

52. *Id.* at 1121.

53. *Id.*

54. 404 U.S. 157 (1971).

55. See, e.g., *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958); cf. *Cox, Labor Decisions of the Supreme Court at the October Term, 1957*, 44 VA. L. REV. 1057, 1074-78 (1958).

templated benefits for retirees. Unions do not need the indulgence and implicit assumptions of *Sheehy* and *Cantor*.

*American Pad*⁵⁶ carries some of that indulgence over into the federal arena. As noted, the Sixth Circuit's distinction between one paragraph of the collective bargaining agreement and the next is very unconvincing. Practical negotiators probably initialed paragraph two, heaved a sigh of relief, and went on to the next problem. Their very last consideration was the theory of negative implications that enabled the Sixth Circuit to reach its sympathetic result.⁵⁷

*United Steelworkers v. Midvale-Heppenstahl Co.*⁵⁸ rests on much firmer ground. The evidence presented by the union, including a comparison of preceding agreements, the union's negotiating strategy in securing contract changes, and the contemporaneous construction of the contract, against interest, by the company, shows that the court gave effect to the parties' negotiated benefits for retirees.⁵⁹

The holding in *United Steelworkers v. Manitowoc Co.*⁶⁰ is hard to justify on any basis. The contract obligated the company "to assume the full obligation to all employees who retire . . . as regards the . . . life insurance to be paid by the company."⁶¹ Just as the word "continue" in *American Pad* was ambiguous regarding the duration of retirees' benefits, this insurance clause did not indicate how long the company agreed to "assume the full obligation" of insurance premiums for workers. Yet the court found "the full vesting of the right to life insurance benefits for the duration of the retirement period to qualified retirees."⁶²

This result is absurd. Nothing in the contract even remotely suggested a continuation of rights for anyone beyond the expiration of the agreement. But the sympathies of the district judge were quite enough: "Further, this conclusion logically flows from the policy consideration implicit in *American Pad* towards the vesting of retiree rights when the employee service called for is fully performed."⁶³ But the policy considerations "implicit" in *American Pad*, however, confused the posture of the individual dealing directly with his employer and the individual whose retirement benefits are negotiated through

56. *Upholsterers' Int'l Union v. American Pad & Textile Co.*, 372 F.2d 427 (6th Cir. 1967).

57. *Id.* at 428. In *American Pad* the court of appeals also accepted the district court's denial of summary judgment, 263 F. Supp. 765, 768 (S.D. Ohio 1965), to a second class of retirees—those who retired after a collective agreement with an express termination clause was signed. (Before that, the separate insurance supplement had no termination provision.) This agreement and the termination clause in effect made the retirees' insurance paragraph indistinguishable from the preceding paragraph relied on by the Sixth Circuit. *American Pad* thus implicitly rejects the Ohio court's refusal to give effect to a termination clause.

58. 94 Lab. Cas. 20,940 (W.D. Pa. 1981), *aff'd mem.*, 676 F.2d 689 (3d Cir. 1982).

59. Brief in Support of Plaintiff's Motion for Summary Judgment at 1-3, *United Steelworkers v. Midvale-Heppenstahl Co.*, 94 Lab. Cas. 20,940 (W.D. Pa. 1981), *aff'd mem.*, 676 F.2d 689 (3d Cir. 1982) (plaintiff's motion for summary judgment granted).

60. Nos. 3041, 3057, slip op. (E.D. Mich. June 10, 1975).

61. *Id.* at 6.

62. *Id.* at 8.

63. *Id.*

collective bargaining. When a union has actively negotiated for retirees, a court should vigorously examine the contract and its bargaining history—and indeed require that evidence—before reading an expensive and unintended (or unanticipated) commitment into a contract.

Just as a collective bargaining agent can negotiate an increase in the benefits of retirees, so too can it negotiate a decrease in those benefits. In *Turner v. Local 302, International Brotherhood of Teamsters*,⁶⁴ the fund that provided benefits for retirees experienced severe cash flow problems because of an increase in the proportion of retired employees to active employees. In response the employer and the union negotiated a reduction in benefits and a charge to those retirees who wished to remain in the medical program. The plaintiff claimed that he had a vested right in the level of insurance benefits in effect on the date of his retirement. If vested, those rights could not be altered without his agreement. The negotiated reduction did not affect plaintiff's pension; only his medical benefits were changed.⁶⁵ The Ninth Circuit rejected Turner's argument that his insurance benefits vested.⁶⁶

The court looked to the bargaining history to find that the medical benefits for retirees "could be terminated at the end of any one of the collective bargaining agreements" and that the benefits could properly be increased or decreased.⁶⁷ The plaintiff's consent was not an essential ingredient of any change.

Turner clearly illustrates the differing postures of the individual employee and the worker represented by a collective bargaining agent. In *Cantor*⁶⁸ and *Sheehy*⁶⁹ the individuals performed the services required of them, and their employers were estopped from changing benefits on which these individuals theoretically relied in consenting to work for as long as they did. The reliance of the employees in these cases on anticipated retirement benefits is largely speculative. They may have been equally attracted by the current wage scale, the quality of the supervision, or the chance for advancement—in short, any one of a thousand considerations that lead an individual to accept and stay on any job. Retirement benefits were probably a stronger inducement at age sixty than at age thirty, but proof of this attraction would be almost impossible to obtain and, if obtained, would likely be highly self-serving.

In *United Rubber Workers v. Lee National Corp.*⁷⁰ the court reached the same result as *Turner*, and articulated an economic premise that may or may not be accurate:

64. 604 F.2d 1219 (9th Cir. 1979).

65. *Id.* at 1225. The statutory vesting requirements of ERISA apply to pension plans, not to welfare benefit plans such as life and health insurance. 29 U.S.C. § 1051(1) (1974). *See also* *Turner v. Local 302, Int'l Bhd. of Teamsters*, 604 F.2d 1219, 1225 n.5 (9th Cir. 1979); *Metal Polishers Local No. 11 v. Kurz-Kasch, Inc.*, 538 F. Supp. 368, 374 (S.D. Ohio 1982).

66. 604 F.2d 1219, 1226 (9th Cir. 1979).

67. *Id.* at 1225.

68. *Cantor v. Berkshire Life Ins. Co.*, 171 Ohio St. 405, 171 N.E.2d 518 (1960).

69. *Sheehy v. Seilon, Inc.*, 10 Ohio St. 2d 242, 227 N.E.2d 229 (1967).

70. 323 F. Supp. 1181 (S.D.N.Y. 1971).

The intent to terminate as to *all* employees, including retirees, is fortified by the undisputed fact that group insurance, which rests upon the insurability of the *entire* group, would be unobtainable, except possibly at prohibitive rates, for a group limited to retirees, who are for the most part over 65 years of age.⁷¹

The merits of this economic analysis are severely challenged by Arbitrator Summers in *Roxbury Carpet Co. v. Textile Workers*, quoted above.⁷²

C. Arbitrators and Vested Rights

Those who view arbitrators as misty-eyed sentimentalists will be surprised to discover arbitrators are far less likely than a federal court to imply vesting of retirees' insurance benefits. Illustrative is *Coulter Manufacturing Ltd.*⁷³ Phasing out its operations, Coulter told all employees, including retirees, that after the existing collective agreement lapsed, insurance coverage would have to be arranged through the carrier.⁷⁴ Holding that the company was not obligated to continue paying insurance premiums for anyone—including retirees—beyond the term of the contract, the arbitrator stated:

There is no term to these benefits expressed in the collective agreement. It does not follow, however, that the company is obliged to provide such benefits for the lifetimes of the persons concerned. These benefits, *which might indeed have been changed in subsequent negotiations*, run, like the other benefits provided by the collective agreement, for the term of the collective agreement.⁷⁵

The arbitrator recognized that benefits for retirees are collectively bargained.

Contract terms at least as favorable to the employee as those in *American Pad* were present in *Great Atlantic & Pacific Tea Co.*⁷⁶ The company agreed to pay the premiums for group health and Blue Cross coverage for early retirees between the ages of sixty-two and sixty-five. After some employees accepted early retirement, the company closed some of its warehouses and terminated those persons' insurance benefits.⁷⁷ The arbitrator found:

The fact that a retired employee receives pension benefits does not, by itself, subsume any relationship which would entitle the employee (or the Union) to other rights—such as the right to require the employer to make premium payments to keep alive insurance policies providing for benefits in the event of sickness occurring after the termination of the employment relationship of the retired employee and his employer.⁷⁸

71. *Id.* at 1188.

72. See *supra* note 22 and accompanying text. In *UAW v. Cadillac Malleable Iron Co.*, 3 EBC 1369 (W.D. Mich. 1982), the parties agreed, and the court found, that a retiree-only group would impose "significantly higher" costs. *Id.* at 1372.

73. 50 Lab. Arb. 1055 (1972) (Weatherill, Arb.).

74. *Id.* at 1058.

75. *Id.* at 1057 (emphasis added).

76. 67 Lab. Arb. 125 (1972) (Seitz, Arb.).

77. *Id.* at 126.

78. *Id.* at 127. *Accord* *Duquesne Brewing Co.*, 60 Lab. Arb. 85 (1972) (Dybeck, Arb.) (employees not entitled to the continuation of insurance and medical benefits following permanent shutdown of the plant); *White Rock Corp.*, 58 Lab. Arb. 862 (1972) (Glushien, Arb.) (right to sick-leave pay not "vested" under expired

Those arbitrators who have found an obligation to continue insurance premiums have done so on an express contract clause. A leading example is *American Standard, Inc.*,⁷⁹ in which the company closed its Columbus, Ohio plant and terminated the payment of insurance premiums for retirees and others. The insurance clause in the agreement stated that its coverage "shall be continued *for the life of the employee* in the amount established at the time the individual employee retires."⁸⁰ This express term—and not the policy implications of *American Pad*—led the arbitrator to rule that retirees were entitled to the continuation of their benefits.⁸¹

To be sure, just as some judges rationalize their results, some arbitrators are indulgent. No case better illustrates this point than *Roxbury Carpet Co.*⁸² After perceptively noting that parties will rarely anticipate, or provide for, the contingency of a plant closing, the arbitrator ignored his own understanding. He demolished the employer's "most forceful argument" by showing that the actual cost of a retirees-only group was no greater than the cost of including retirees in a larger group with active employees.⁸³ But he failed to support his conclusion that the employer agreed to continue the premiums. Instead, despite his explicit finding that there was no "intent one way or the other on the specific issue"⁸⁴ during any of the negotiations, he concluded that the company made a promise and assumed the obligation to pay the premiums for the rest of the retirees' lives. His conclusion is based on nothing more than the retirees' expectation of lifetime benefits.⁸⁵

V. CONCLUSION

It is hardly startling that some judges strain to protect the insurance premiums of retirees, for cancellation of these premiums certainly imposes a hardship. Since in most cases retirees are already living on a fixed income, the additional expense of insurance premiums is an unwelcome surprise.

But insurance premiums for older persons are generally very expensive and the obligation to pay them should be solidly grounded in fact. Retirees should have to prove, at the very least, that the obligation to pay their insurance premiums, in spite of the closure of the plant, was actively contemplated by the retirees or their collective bargaining agent.

Furthermore, the presence of a collective bargaining agent is crucial. Unions can negotiate for retirees, and have done so. If union negotiators have

contract when employees were terminated following plant closing); *American Zinc Co.*, 57 Lab. Arb. 1140 (1971) (Ray, Arb.) (employer not obligated to pay vacation pay to employees terminated in the course of the phase-out of the employer's business).

79. 57 Lab. Arb. 698 (1971) (Warns, Arb.).

80. *Id.* at 699 (emphasis added).

81. *Id.* at 700.

82. 73-2 Lab. Arb. Awards 4935, 4937 (1973) (Summers, Arb.).

83. *Id.* at 4940.

84. *Id.* at 4937.

85. *Id.* at 4938-39.

not secured this benefit, imaginative judges or arbitrators should not do their job for them. The Ohio Supreme Court has clearly recognized the difference between imposed and negotiated benefits:

A rational basis exists for the distinction in the instant cause. As mentioned earlier, and as stated in the Court of Appeals' opinion below, "[o]ur national recognition of the importance of collective bargaining makes manifest our acknowledgment that through union representation the employee's interests are better protected. Furthermore, there is patently a difference between a plan negotiated at arm's length and one unilaterally adopted by the employer."⁸⁶

86. *Salzi v. Gibson Greeting Cards, Inc.*, 61 Ohio St. 2d 35, 39, 399 N.E.2d 76, 79 (1980).